

JS-6

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CLARENCE BUTLER,	)	CV 16-00268 RSWL (KKx)
	)	
Plaintiff,	)	
	)	
v.	)	<b>ORDER Re: DEFENDANTS'</b>
	)	<b>MOTION TO DISMISS [7]</b>
THE BARONA BAND OF MISSION	)	
INDIANS OF CALIFORNIA;	)	
BARONA TRIBAL GAMING	)	
AGENCY; BARONA RESORT AND	)	
CASINO; AND DOES 1 through	)	
50, inclusive,	)	
	)	
Defendants.	)	
	)	
	)	

Now before the Court is Defendants Barona Band of Mission Indians of California, Barona Tribal Gaming Agency, and Barona Resort & Casino's (collectively "Defendants") Motion to Dismiss ("Motion") [7]. The action arises out of Plaintiff Clarence Butler's ("Plaintiff") alleged injury that occurred in the Barona Resort and Casino.

I. BACKGROUND

A. Factual Background

Defendant Barona Band of Mission Indians of California ("the Tribe") is a federally recognized Indian tribe with jurisdiction over the Barona Indian Reservation. Compl. ¶ 2, ECF No. 1. Defendant Barona Tribal Gaming Agency, a.k.a. the Baron Tribal Gaming Commission ("the Gaming Agency") and the Barona Resort and Casino ("the Casino") are business entities. Id. at ¶ 3. At all relevant times, the Gaming Agency was the Tribe's duly authorized agent and employee that operated and was responsible for the Tribe's gaming, gambling, resort, and hotel operations. Id. The Casino is the Tribe and the Gaming Agency's employee in operating and maintaining the resort and Casino located on the Barona Indian Reservation. Id.

Pursuant to the Indian Gaming Regulatory Act of 1988, codified in 18 U.S.C. § 1166 et seq.; 25 U.S.C. § 2701 et seq. ("the Act"), the Tribe entered into a compact with the State of California ("the Compact") in October 1999 to allow it to operate gambling facilities within the State. Id. at ¶ 5; see Opp'n Ex. 2, ECF No. 10. In the Compact, the Tribe agreed to comply with certain standards relating to public health and safety at its facilities, to maintain certain public insurance for personal injury claims by patrons injured at the facilities, to adopt a tort liability ordinance setting forth the terms and conditions under which it would

1 waive its sovereign immunity relating to such claims,  
2 and the procedures for processing those claims. Id.  
3 Accordingly, on December 22, 2009, the Tribe adopted a  
4 tort claims ordinance ("Barona Tort Claims Ordinance").  
5 See Declaration of Kathryn Clenney ("Clenney  
6 Declaration") Ex. B, ECF No. 7-4; see also Opp'n Ex. 1,  
7 ECF No. 10. The Barona Tort Claims Ordinance clearly  
8 states that it waives immunity from suit only in Tribal  
9 Court. See Clenney Decl. Ex. B. § IV.

10 On February 16, 2016, Plaintiff was standing in  
11 line at the Barona Casino to cash his gambling chips.  
12 Compl. ¶ 8. Plaintiff was standing with his back  
13 towards the crowd, second in line before the cashier,  
14 when the stanchion holding the rope collapsed against  
15 Plaintiff's right knee, injuring him. Id. "Plaintiff  
16 suffered short term, long term and permanent physical  
17 injuries, pain, suffering, stress, anxiety, insomnia, as  
18 well as loss of income." Id.

19 On February 26, 2014, Plaintiff filed his claim,  
20 notifying the Casino that he had suffered an injury.  
21 Id. at ¶¶ 10-11. The Casino mailed Plaintiff, by  
22 Certified Receipt, and Plaintiff received through his  
23 counsel, a claim form and a copy of the 1999 Tort Claims  
24 Ordinance. Id. at ¶ 11. On May 4, 2015, the Tribe  
25 mailed a Notice of Rejection of Tort Claim with the  
26 forms for appeal. Id. at ¶ 13. On May 26, 2015,  
27 Plaintiff appealed the Tribe's rejection of his claim.  
28 Id. at ¶ 14. Plaintiff alleges it has heard no response

1 on its appeal. Id. at ¶ 15.

## 2 **B. Procedural Background**

3 Plaintiff filed its Complaint [1] on February 11,  
4 2016. On March 19, 2016, Defendants filed their Motion  
5 to Dismiss [7]. On April 18, 2016, Plaintiff filed an  
6 untimely Opposition [10] to Defendants' Motions to  
7 Dismiss. On April 19, 2016, Defendants filed their  
8 Reply [11]. The Motion was set for hearing on May 3,  
9 2016, and was taken under submission on April 28, 2016.

## 10 **II. DISCUSSION**

### 11 **A. Legal Standard**

#### 12 1. Motion to Dismiss Pursuant to FRCP 12(b)(1)

13 Federal Rule of Civil Procedure 12(b)(1) authorizes  
14 a court to dismiss claims over which it lacks proper  
15 subject matter jurisdiction. A court is free to  
16 determine jurisdiction on a motion to dismiss for lack  
17 of jurisdiction under Rule 12(b)(1) "unless the  
18 jurisdictional issue is inextricable from the merits of  
19 a case." Kingman Reef Atoll Invs., L.L.C. v. United  
20 States, 541 F.3d 1189, 1195 (9th Cir. 2008) (citing  
21 Roberts v. Corrothers, 812 F.2d 1173, 1177 (9th Cir.  
22 1987)).

### 23 **B. Analysis**

#### 24 1. The Parties' Failure to Comply with Local Rule 25 7-3

26 Local Rule 7-3 requires that "counsel contemplating  
27 the filing of any motion shall first contact opposing  
28 counsel to discuss thoroughly, preferably in person, the

1 substance of the contemplated motion and any potential  
2 resolution." L.R. 7-3. The Local Rule further requires  
3 that this conference shall take place at least seven (7)  
4 days prior to the filing of the motion. Id. Here,  
5 Defendants' Motion [7] appears to have been filed  
6 without the parties engaging in a "meet and confer" as  
7 required by Local Rule 7-3.

8 This Court may, in its discretion, refuse to  
9 consider Defendants' Motion for failure to comply with  
10 Local Rule 7-3. See, e.g., Reed v. Sandstone  
11 Properties, L.P., No. CV 12-05021 MMM (VBKx), 2013 WL  
12 1344912, at \*6 (C.D. Cal. Apr. 2, 2013). However, as  
13 neither party addresses the issue, and there otherwise  
14 appears to be no prejudice to Plaintiff in considering  
15 Defendants' Motion on the merits, the Court hereby  
16 exercises its discretion to do so. Reed, at \*6; See  
17 Thomas v. U.S. Foods, Inc., No. 8:12-cv-1221-JST (JEMx),  
18 2012 WL 5634847, at \*1 n. 1 (C.D. Cal. Nov. 14, 2012)  
19 (considering the plaintiff's motion despite failure to  
20 comply with Local Rule 7-3). However, the Court  
21 admonishes the parties of the seriousness of its failure  
22 to follow the Local Rules, and cautions the parties to  
23 fully comply with all Local Rules in the filing of any  
24 future motions.

25 2. Plaintiff's Opposition Was Untimely

26 Local Rule 7-9 provides, in pertinent part: "Each  
27 opposing party shall, not later than ten (10) days after  
28 service of the motion in the instance of a new trial

1 motion and not later than twenty-one (21) days before  
2 the date designated for the hearing of the motion in all  
3 other instances, serve upon all other parties and file  
4 with the Clerk either (a) the evidence upon which the  
5 opposing party will rely in opposition to the motion and  
6 a brief but complete memorandum which shall contain a  
7 statement of all the reasons in opposition thereto and  
8 the points and authorities upon which the opposing party  
9 will rely, or (b) a written statement that that party  
10 will not oppose the motion." L.R. 7-9.

11 Local Rule 7-12 provides that: "The Court may  
12 decline to consider any memorandum or other document not  
13 filed within the deadline set by order or local rule.  
14 The failure to file any required document, or the  
15 failure to file it within the deadline, may be deemed  
16 consent to the granting or denial of the  
17 motion." L.R. 7-12.

18 Plaintiff's Opposition to Defendants' Motion to  
19 Dismiss was filed on April 18, 2016, only fifteen days  
20 prior to the scheduled hearing, and six days after the  
21 deadline proscribed in the Local Rules. Accordingly,  
22 this Court could grant Defendants' Motion to Dismiss,  
23 pursuant to Local Rule 7-12, on the basis of Plaintiff's  
24 late opposition alone. Nonetheless, the Court exercises  
25 its discretion to consider the parties' arguments on  
26 their merits.

3. This Court Lacks Subject Matter Jurisdiction over Plaintiff's Claim

a. Defendants are protected by sovereign immunity.

Generally, it is well-established that Indian tribes possess sovereign immunity from unconsented suit.

"Suits against Indian tribes are [] barred by sovereign immunity absent a clear waiver by the tribe or

congressional abrogation." Oklahoma Tax Commission v.

Citizen Band of Potawatami Indian Tribe, 498 U.S. 505,

509 (1991); see also In re Greene, 980 F.2d 590, 592

(9th Cir. 1992); Burlington Northern Railroad Co. v.

Blackfeet Tribe, 924 F.2d 899, 901 (9th Cir. 1991); Pan

American Co. v. Sycuan Band of Missian Indians, 894 F.2d

416, 418 (1989); Kiowa Tribe v. Manufacturing

Technologies, 523 U.S. 751, 754 (1998). The Tribe in

the present matter is a federally-recognized Indian

tribe, and as such, is generally immune from unconsented suit.

Further, both the Casino and the Gaming Agency

share the same legal status as the Tribe itself,

including its sovereign immunity. The Ninth Circuit so

held in Allen v. Gold Country Casino, 464 F.3d 1044 (9th

Cir. 2006); see also *American Vantage Cos. v. Table*

Mountain Rancheria, 292 F.3d 1091, 1100 (9th Cir. 2002).

Barona's Tort Claims Ordinance specifically reads: "the

agencies, enterprises and officers of the Barona Band of

1 Mission Indians share the sovereign immunity of the  
2 tribe." See Clenney Decl. Ex. B, ECF No. 7-4. Thus,  
3 all named Defendants in the present matter share the  
4 sovereign immunity of the Tribe, subject to express  
5 waiver.

6 In fact, Plaintiff concedes that Defendants are  
7 protected from unconsented suit by sovereign immunity,  
8 stating "[t]he plain reading of this ordinance clearly  
9 shows Barona['s] waiver of sovereign immunity does not  
10 exist outside the [Tribe's] tribunals as it retains the  
11 'unfettered discretion' to determine whether Plaintiff  
12 has complied with the procedural requirement[s]" of the  
13 Tribe's dispute resolution process. Opp'n 5:16-20.

14 *b. Defendants did not waive their sovereign*  
15 *immunity.*

16 In his Complaint, Plaintiff requests that this  
17 Court order the parties to arbitrate their dispute. See  
18 generally Compl., ECF No. 1. Upon review of Plaintiff's  
19 Complaint and Opposition, this Court finds Plaintiff has  
20 proffered no evidence whatsoever that Defendants waived  
21 sovereign immunity so as to warrant Plaintiff bringing  
22 suit in this Court. Rather, Plaintiff admits that  
23 Barona's Tort Claims Ordinance waives sovereign immunity  
24 only in its own forum, namely, in Barona Tribal Court.  
25 See Opp'n 5:16-20. Furthermore, Plaintiff does not  
26 allege or proffer specific facts establishing diversity  
27 jurisdiction or federal question jurisdiction over the



1 matter.

2 Plaintiff loosely argues that the present case is  
3 analogous to Compo Band of Missions Indians v. Superior  
4 Court, 137 Cal. App. 4th 175 (2006), and that "[i]n our  
5 case as in Campo the Court has a limited jurisdiction to  
6 order arbitration." Opp'n, 5:15-6:14. Plaintiff  
7 misstates the holding of Campo. In Campo, the Court  
8 found that although the Tribe waived its tribal  
9 sovereign immunity relating to a patron's negligent  
10 personal injury claim in tribal court, the waiver did  
11 not include a right to be sued in state court. 137 Cal.  
12 App. 4th at 185. Rather, the waiver was limited to  
13 bringing suit in tribal court. Id. As such, the  
14 California Court of Appeal held that the trial court  
15 lacked subject matter jurisdiction to compel arbitration  
16 on the merits of Plaintiff's claim. Id.

17 Further, in Lawrence v. Barona Valley Ranch Resort  
18 & Casino, the court reviewed the same Tort Claims  
19 Ordinance that is before this Court and held that the  
20 ordinance does not waive sovereign immunity in state  
21 court. 153 Cal. App. 4th 1364 (2007). In so holding,  
22 the Court noted "wile Barona agreed to waive its tribal  
23 sovereign immunity to certain claims against it, it was  
24 permitted to choose the forum for resolution of those  
25 claims and the terms governing the process for such  
26 resolution." Id. at 1372. The court's analysis in  
27 Lawrence is applicable here. Plaintiff had the

1 opportunity to proceed in Barona's forum, but chose to  
2 proceed in federal court instead.

3 When subject matter jurisdiction is challenged  
4 under Federal Rule of Civil Procedure Rule 12(b)(1), the  
5 plaintiff has the burden of proving jurisdiction in  
6 order to survive the motion. Tosco Corp v. Communities  
7 for a Better Environment, 236 F.3d 495 (9th Cir. 2001).  
8 Plaintiff has proffered no factual support to warrant  
9 this Court's jurisdiction. This Court finds that  
10 Plaintiff has failed to meet its burden to sufficiently  
11 allege this Court's jurisdiction, and accordingly,  
12 Defendants' Motion to Dismiss is **GRANTED**.

13 Plaintiff will not be afforded leave to amend his  
14 claim, as this Court finds Barona's Tort Claims  
15 Ordinance is clear. Plaintiff's claim may only be  
16 brought in Tribal Court, and as such this Court's  
17 granting leave to amend would be futile. As Plaintiff  
18 brings a personal injury claim, it is not clear to this  
19 Court how Plaintiff could amend his claim to arise under  
20 a federal question to warrant federal subject matter  
21 jurisdiction. Further, the Ninth Circuit has held that  
22 Indian tribes and their agencies, such as casinos, are  
23 not "citizens" of any state for purposes of diversity  
24 jurisdiction. American Vantage Companies, Inc. v. Table  
25 Mountain Rancheria, 292 F.3d 1091, 1098 (2002).  
26 Accordingly, for diversity jurisdiction purposes,  
27 federal courts do not recognize Indian tribes as foreign

1 states, as Plaintiff contends in his Opposition.  
2 Rather, they are stateless entities that may not sue or  
3 be sued in federal court. See Frazier v. Brophy, 358  
4 Fed. Appx. 212, 213 (2d Cir. 2009)(conclusion that  
5 Indian tribe is not a citizen of any state "accords with  
6 the treatment of other domestic sovereigns, such as  
7 states, which cannot sue or be sued in diversity"); see  
8 also Altheimer & Gray v. Sioux Mfg. Corp., 983 F.2d 803,  
9 812 (7th Cir. 1993). Finally, in either his Complaint  
10 or his Opposition, Plaintiff has pointed to no reason  
11 why jurisdiction in this Court is proper.

12 Based on the foregoing, this Court **GRANTS**  
13 Defendant's Motion to Dismiss [7], without leave to  
14 amend. The Clerk shall close this case.

15 **IT IS SO ORDERED.**

16 DATED: May 6, 2016

s/ RONALD S.W. LEW  
**Honorable Ronald S.W. Lew**  
Senior U.S. District Judge